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By Facsimile, E-mail, and Hand Delivery

Geoffrey Griffis
Chair, D.C. Board of Zoning Adjustment
Suite 210
441 4th Street, N.W.
Washington, D.C. 20001

Re: BZA Application No. 17211 for Special Exception to Continue Use of Broadcast Tower at 4001 Nebraska Avenue, N.W.

Dear Chairman Griffis and Members of the Board:

This letter is a response to the November 3, 2004 letter and attachments to the Board from Edward L. Donohoe, counsel for the National Broadcasting Company (NBC), the applicant in the above referenced case. Mr. Donohoe provided an interpretation of 11 DCMR Section 211.5 in that letter based on subsections of Section 211, a 23-year old BZA case and the 12-year old BZA decision that granted the original special exception for the tower that is the subject of this new application. Mr. Donohoe also cited another zoning regulation, 11 DCMR Section 201.6, which permits the addition of an antenna to an existing tower, as informative in determining the meaning of Section 211.5. I respectfully disagree with Mr. Donohoe's (the Applicant's) interpretation.

The special exception process pursuant to Section 3104 allows, under certain conditions stated in Section 211, the erection and use of towers that are taller than matter of right allows. The special exception process is not used to approve the location of specific antenna on a tower, which is governed as a matter of right pursuant to Section 201.6. The question the Board posed is whether Section 211.5 only permits the consideration of an applicant's need to reasonably broadcast to its service area or whether the regulations expand to include the needs of other tower tenants to locate on a specific tower.

This Board has examined adjoining subsections or the sequencing of subsections to gain more information about the meaning of a particular subsection. In examining Sections 211.1 through 211.10, which govern special exceptions for broadcast towers, it is evident that Section 211 is describing the criteria for the erection, alteration and use of a single tower owned by a single applicant. A careful reading of Section 211 also makes it clear that the term "antenna" is used interchangeably with the term "tower." Indeed, in Section 199 an antenna is defined as including the tower. Sections 211.2 through 211.4 discuss the physical characteristics of the antenna tower, the location of the antenna tower, and the manner of securing the tower so that neighboring property is not adversely impacted. All of these sections are addressing the tower and not tenant antennae. The very last subsection, 211.10, states that the applicant has the burden of demonstrating why it needs the proposed tower height and why matter of right rules would be "unduly restrictive, prohibitively costly, or unreasonable." The focus of the Section 211.10 is the tower and why the applicant needs it, just as Sections 211.1 through 211.4 focus the Board's consideration on the specific characteristics of a single tower. Nowhere in Section 211 is there a requirement for potential users of the

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tower to demonstrate that they need the applicant's tower or that they have a need for a particular height tower. On the contrary, the burden is exclusively on the applicant to show that it needs the tower at a particular height to broadcast satisfactorily.

To understand what is meant by demonstrating the "need" for a particular tower height one should look to Sections 211.5 and 211.6. The former states that the height should not exceed what the applicant reasonably needs to "render satisfactory service to all parts of its service area." Since the whole of Section 211 is addressing one tower and one applicant/owner, and not any of the potential tenants, to comply with this section the owner/applicant must show that it needs the tower for its own broadcasting service. Section 211.6 also addresses "need." This subsection reiterates earlier subsections that condition locating towers in residential areas by stating that an application for a transmitting tower cannot be approved unless the applicant can show that the proposed tower is necessary to provide good and economically reasonable transmission. Nowhere in either of these sections is there any mention that other potential users of the tower must show that they need the tower for their transmissions. It is only the applicant that must demonstrate that it needs that tower, at that location, and at that height to meet its broadcasting need.

The Applicant argues that the demonstration of the need for the tower includes a consideration of the broadcasting needs of every tenant using the tower. If the Board accepts this interpretation, it would need testimony and a record demonstrating each tenant's need for this tower in order to grant the special exception based on this category of need. All of the tenants would have to be parties and each testify about its need for that height tower and that there is no technically satisfactory and economical alternative available. As is evident from the record in this case, the Board has no such testimony. Yet, NBC is arguing that this absence of record should be the basis for determining need pursuant to Section 211.5. NBC expects the Board to equate use of the tower with need. But a plain reading of the regulations shows that more than use is necessary. If the Zoning Commission expected the Board to consider the need of the tenants, it would have required tenants to be parties and provide the Board with answers to whether they could locate on another tower and whether they had economic or broadcasting needs that could not be satisfied on another tower. NBC's interpretation is not persuasive given the total lack of any provisions within Section 211 requiring a demonstration of need from tenants.

The Applicant cites a 1981 case, Application No. 13524, as proof that the Board has previously considered the needs of tower users other than the applicant. The present case is readily distinguishable from the 1981 case. The zoning regulations in effect when the BZA decided that case (Exhibit D of Mr. Donohue's submission) date from 1958 when broadcast technology was limited to a broadcast antenna tower. The zoning regulations have been amended since the 1981 case and now include Section 201.6, which allows antenna tenants to locate on an existing tower in a residential district as a matter of right. That was not the case in 1981. When the Metropolitan Police Department filed for a special exception, Application No. 13524, they did so because they wanted to convert part of their tower for commercial use and they wanted to increase the height of the tower for the same purpose. Had they wanted to increase the height to accommodate more governmental users they could have done so as a matter of right. The Board considered specific potential users in making their decision because there were no matter of right regulations allowing commercial broadcast antenna tenants to locate on antenna towers at that time. The Board only approved one commercial user, Channel 50, because they received detailed testimony regarding the type, size and exact location of antenna and testimony by radio engineering consultants regarding the necessity of using this tower. Approval for additional commercial antenna users was denied because the BZA stated it had insufficient information to determine whether additional antennae would adversely affect the neighboring property. Application No. 13524 presented a different set of facts and involved a different level of BZA purview than is found in the current NBC special exception case. Now commercial antennae can be located on a tower as a matter of right (Section 201.6) and the BZA has no authority to determine type of antenna or location on a broadcast tower and thus, no reason to evaluate the need for a given antenna. This case is therefore irrelevant to determining the scope of Section 211.5.

The Applicant further misreads the governmental policy implied by Section 201.6, which does not encourage co-location of antennae in order to justify the retaining of a tower. First the tower must meet the permitting requirements, which in this case are the requirements for a special exception to function in a residential district. If granted a special exception, the tower can then be used for the co-location of

antennae. But that is strictly an after-the-fact consideration. The co-location policy does no imply that there should be more towers, rather than fewer, or that a particular tower should be built or retained, rather than not built or retained. Furthermore, there was no creditable testimony in this case that the tenants could not co-locate either to the other NBC tower or to a different tower. All the Board has before it is speculation that **perhaps** another policy addressing co-location **might be** impacted by a special exception consideration that does not include any provision to evaluate co-location issues.`

It should also be noted that the Applicant does not argue that it needs the tower for its use. The testimony actually showed that NBC does not need the tower for its broadcasting needs. The Applicant's case for reissuing the special exception rests almost entirely on persuading the Board that Section 211 can be satisfied with assumptions about its tenants' needs. Alternatively, the Applicant cites economic benefit to itself from tower rentals as evidence of its need for the tower. The latter argument seems to be a back-door approach to asserting the existence of economic hardship in making use of its property. The Applicant has not laid the foundation for any such assertion, and it would be erroneous for the Board to consider it when judging the Application.

The Applicant further argues that the Board doesn't need clarification of Section 211.5 in order to decide the current case because on January 21, 2004 the Board issued a special exception, Order No. 15708-A, which granted the use of the tower, and that the material facts haven't changed and thus, the result should remain the same. However, Order 15708-A was based on a 12-year old hearing record that included testimony that there were NBC antennae on the tower that were critical to the operation of the NBC-owned TV station. These included linkages to the Mall area, the District Building, the White House, the State Department and Capitol Hill. The Testimony in the current special exception case revealed that NBC has only one antenna on the tower and that it could be moved to the larger tower, also owned by NBC. This is a material change.

Finally, the Applicant offers that if the special exception is not granted the tower tenants would be required to seek approval to build new towers to meet their broadcasting needs. He goes on to say that this would be contrary to public policy embodied in Section 201.6. These statements are a leap of logic. There was no testimony from any of the tower tenants that they could not relocate if NBC is not issued a new special exception. (The Office of Planning testified that they also had no information about alternatives to the NBC tower for the current tenants.) There also was no testimony that the tower tenants only recourse would be to build new towers in order to continue broadcasting. Without testimony and a record the Board should not resort to speculation as a basis for its decision. Furthermore, Section 201.6 does not state or even imply that towers located in residential districts should be preserved notwithstanding their compliance with the special exception provisions. Section 201.6 simply allows broadcast antenna to locate on **any** existing broadcast tower without BZA approval.

All parties agree that proliferation of broadcasting towers in residential areas should be avoided. Both Councilmember Mendelson and ANC 3C offered testimony that included advisories in the District of Columbia Comprehensive Plan that decision makers should avoid approving towers in residential areas. If NBC's interpretation of the Section 211.5 is supported by the BZA new applicants for special exceptions to build or expand towers in residential areas can cite as evidence of compliance with Section 211.5 that they have tenants who will lease the space. According to the NBC analysis the applicant would not have to show that the tenants had a need as described in Section 211, but only that they had a desire and willingness. And the applicant would not have to demonstrate that it had a need to broadcast to a service area that could not be satisfied by a current tower, smaller tower, or one at another location. Based on the Applicant's interpretation a broadcast tower could be used exclusively to raise revenue and not meet any expressed broadcasting need of the applicant, as long as there were tenants.

An applicant for a special exception to build or retain a tower must justify the need based on its own need, not the need of its rental customers. The applicant cannot hold his tenant in front of him, as though the tenant were the applicant. It is the applicant's use of the tower, not a tenant's use, which must be considered by the Board when judging whether a special exception is justified. In this case, the Applicant's primary use of the tower is as a rental property and not for its broadcasting use.

ANC 3C respectfully requests that the Board deny this application on the basis that the applicant has not complied with all of the provisions of Section 211.

Sincerely,

Nancy J. MacWood
Chair, ANC 3C

cc: Edward L. Donohue
Councilmember Phil Mendelson
Amy McVeigh
Karen Thomas
Michael Jack